United Nations A/HRC/37/NGO/161

General Assembly

Distr.: General
15 February 2018

English only

Human Rights Council
Thirty-seventh session
26 February-23 March 2018
Agenda item 2
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Joint written statement* submitted by the American Association of Jurists, Asociación Española para el Derecho Internacional de los Derechos Humanos, France Libertés : Fondation Danielle Mitterrand, the International Fellowship of Reconciliation, and Paz y Cooperación, non-governmental organizations in special consultative status, and Mouvement contre le racisme et pour l'amitié entre les peuples, a non-governmental organization on the roster

The Secretary-General has received the following written statement, which is hereby circulated in accordance with Economic and Social Council resolution 1996/31.

[2 February 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.18-02373(E)
1802373

Please recycle

Western Sahara: UN responsibility over a Non Self-Governing Territory controlled by an Occupying Power*

Historical and legal background

In 1963, the UN General Assembly (UNGA) included Western Sahara in the list of Non Self-Governing Territories1, to which UNGA Resolution 1514 (XXV) entitled "Declaration on the granting of Independence to colonial countries and peoples" applied.

On 16 October 1975, the International Court of Justice released an Advisory Opinion2 stating, *inter alia*, that "The inferences to be drawn from the information before the Court… are in accord in not providing indications of the existence, … of any legal tie of territorial sovereignty between Western Sahara and the Moroccan State."

On 6 November 1975, King Hassan II of Morocco, invaded Western Sahara militarily and brought thousands of Moroccan civilians into the Territory (Green march). On the same day, the UN Security Council (UNSC) adopted Resolution 380 declaring "Deplorable the realization of the Green March". The Security Council requested Morocco to withdraw immediately all the participants in the march from the territory of Western Sahara.

Subsequently, the UNGA3, while deeply deploring the continued occupation of Western Sahara, urged the Kingdom of Morocco to end the occupation of the Territory and recognized the Polisario Front as the legitimate representative of the people of Western Sahara. The UNGA reaffirmed the inalienable right of the people of Western Sahara to self-determination and independence in accordance with the Charter of the United Nations.

Since then, the UNGA, in recalling the previous resolution when adopting a new one on the "Question of Western Sahara", has repeatedly reaffirmed its interpretation of the legal status of the Territory and the inalienable right of the people of that Territory to self-determination and independence. It also consistently reaffirmed the interpretation of the legal status of the Occupying Power in Western Sahara.

The African Union and the occupation of Western Sahara

On 25 February 2015, the Sahrawi Arab Democratic Republic (SADR)4 requested a legal opinion from the Office of the Legal Counsel (OLC), which was modified on 3 April 2015 on the issue of "the legality in the context of international law, including the relevant UN resolutions and OUA/AU decisions, of actions allegedly taken by the Moroccan authorities or any other State, group of States, foreign companies or any other entity consisting in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activities in Western Sahara."

In its legal opinion5, the Office of the Legal Counsel (OLC) recalled that the Kingdom of Morocco invaded Western Sahara on the pretext of claiming the territory, disregarding a formal call from the UNSC to put an end to the declared march into Western Sahara"6.

---

1 UNGA Resolution 1956 (XVIII)

2 Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p.12

3 UNGA Resolutions 34/37 (21 November 1979) and 35/19 (11 November 1980)

4 SADR is a founding-member of the African Union

5 https://www.au.int/web/en/newsevents/13174/legal-opinion-legality-context-international-law-actions-allegedly-taken

6 UN Security Council Resolution 379 (1975)

The OLC also recalled that, on 27 February 1976, the day after Spain notified the Secretary-General of its withdrawal as the Administering Power, the Polisario Front, unilaterally proclaimed the Saharawi Arab Democratic Republic, in response to the legal and administrative vacuum created by Spain unilaterally, when it withdrew from its colony without finishing the process of decolonization that the UN entrusted it with.

Furthermore, the OLC stressed that notwithstanding the membership of SADR to both OAU and AU, there is recognition that the people of Western Sahara are not fully liberated and that the SADR controls only a part of Western Sahara7. It also stressed that despite the fact that the Kingdom of Morocco occupies a large part of the territory of Western Sahara, it has never been recognized as an Administering Power of the territory pursuant to Article 73 of the UN Charter.

In its conclusions, the OLC emphasized that the Kingdom of Morocco is not an Administering Power over Western Sahara's territory under Article 73 of the UN Charter and that it also does not have sovereignty over Western Sahara.

The European Union Court of Justice and the occupation of Western Sahara

A. The Association and Liberalization agreement between the European Union (EU) and the Kingdom of Morocco

On 21 December 2016, the Grand Chamber of the Court of Justice of the European Union (CJEU) ruled that the Association and Liberalization agreement between the EU and the Kingdom of Morocco was not applicable to Western Sahara8.

Having considered that Western Sahara is listed by the UNGA as a Non Self-Governing Territory, the Court, in conformity with the provisions of the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"9 observed that Western Sahara has a "separate and distinct status [...] in relation to that of any State, including the Kingdom of Morocco" (§ 92) that controls most of the territory of Western Sahara, where a wall of sand was constructed and guarded by the Moroccan army, separating it from the rest of the territory controlled by the Polisario Front (§ 37).

It is worth to recall that besides the above mentioned principle, the "separate and distinct status" of Western Sahara in relation to the Kingdom of Morocco also originates from the international borders that have been established a century ago10 and confirmed in an internationai agreement concluded by the Polisario Front and the Kingdom of Morocco in 199711.

After underlining that the Polisario Front was recognized by the UN as the legitimate representative of the Sahrawi people (§ 105), the CJEU found that the people of Western Sahara must give their prior, free and informed consent for any international agreement to be applicable to the territory of Western Sahara and its natural resources (§ 106).

---

7 The rest is occupied by the Kingdom of Morocco (footnote no.11 on page 3 of the OLC's Legal opinion)

8 https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160146en.pdf

9 A/RES/25/2625 (24 October 1970)

10 The southern and eastern boundaries with the Islamic Republic of Mauritania were established by the "Convention pour la délimitation des possessions françaises et espagnoles dans l'Afrique occidentale, sur la côte du Sahara et sur la côte du Golfe de Guinée", signed in Paris on 27 June 1900. The Northern boundary of Western Sahara with the territory of the Kingdom of Morocco was delimited by two conventions, the Paris Convention signed on 3 October 1904, and the Madrid Convention signed on 27 November 1912. Its delimitation has been slightly corrected by the Madrid Convention signed on 19 December 1956.

11 The paragraph 3 of the Lisbon Compromise Agreement on Troop Confinement, concluded on 29 August 1997, reads as follows: "This compromise shall in no way change, alter or otherwise affect the internationally recognized boundaries of Western Sahara, and shall not serve as precedent for any argument that such boundaries have changed or been altered."

B. The Partnership Agreement between the EU and the Kingdom of Morocco in the fisheries sector

In his Opinion12, delivered on 10 January 2018, the Advocate General of the CJUE asserts that the Fisheries Agreement is invalid.

The Advocate General states that the people of Western Sahara have been deprived of the opportunity to exercise the right to self-determination on the conditions set out by the United Nations General Assembly.

Since the assertion of Moroccan sovereignty over Western Sahara is a breach of the right of the people of Western Sahara to self-determination, the Advocate General concludes that the EU has failed to fulfil its obligation not to recognise the illegal situation resulting from the breach, by the Kingdom of Morocco, of the right of the people of Western Sahara to self-determination and also not to render aid or assistance in maintaining that situation.

The Advocate General also considers that the Kingdom of Morocco is the Occupying Power in Western Sahara and the manner in which the Fisheries Agreement was entered did not comply with the rules of International Humanitarian Law applicable to international agreements entered by an Occupying Power, regarding the occupied territory.

Applicability of International Humanitarian Law

As stressed by the AU's Office of the Legal Counsel, under the Convention IV with respect to the Laws and Customs of War on Land and its Annex, The Hague Convention of 1907, and other rules of international humanitarian law, the Occupying Power may not change the legal, institutional and political status of the occupied territory. This is because occupation is a temporary status and the Occupying Power should not introduce permanent changes in the occupied territory.
The longstanding Kingdom of Morocco's occupation of Western Sahara has led to a number of gross violations of human rights as well as serious and continuous violations of the Fourth Geneva Convention of 1949.
In particular, it is to be highlighted the violations of Articles 31 and 32 (prohibition of coercion, corporal punishment, torture, degrading and inhuman treatments); Article 33 (prohibition of collective penalties, intimidation, pillage, reprisals); Article 49 (prohibition of deportations, transfers, evacuations); Article 53 (prohibition of destruction of real or personal property belonging, individually or collectively, to private persons); and Article 76 (on the treatment of detainees). Some of these violations may amount to war crimes, crimes against humanity and cultural genocide.

Conclusion and recommendations

Western Sahara is the only Non Self-Governing Territory that does not have a recognized Administering Power reporting to the UN General Assembly in conformity with article 73 of the UN Charter. The great majority of the Territory has been under the Kingdom of Morocco's occupation for more than 40 years.
The undersigned organizations consider that the United Nations have the primary responsibility over Western Sahara and therefore call upon:

- the UN Human Rights Council to create the mandate of Special Rapporteur on the Human Rights violations in the Occupied Territory of Western Sahara;
- the UN High-Commissioner for Human Rights to resume, without delay, the technical missions to Western Sahara and the Sahrawi refugees' camps;
- the UN Secretary-General to report to the UN General Assembly in accordance with the modalities set for the Administering Powers by Article 73 of the UN Charter;
- the UN Security Council to include the monitoring of Human Rights in the mandate of the MINURSO13.

---

12 :https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-01/cp180001en.pdf

13 The UN Mission for the Referendum in Western Sahara was created by the UN Security Council with the adoption, in April 1991, of resolution 690 which, by approving the UNSG's reports (S/21360 and S/22464), determinate that the referendum was to be held within 9 months.

*Acción Solidaria Aragonesa (ASA) - Adala UK - Arabako SEAD en Lagunen Elkartea - Asociación de Amigos y Amigas de la R.A.S.D. de Álava - Asociación Amigos del Pueblo Saharaui del Campo de Gibraltar (FANDAS) - Asociación Amigos del Pueblo Saharaui de Toledo - Asociación de Amistad con el Pueblo Saharaui de Albacete - Asociación Asturiana de Solidaridad con el Pueblo Saharaui - Asociación Canaria de Amistad con el Pueblo Saharaui (ACAPS) - Asociación de Discapacitados Saharauis (Aaiún) - Asociación Ecuatoriana de Amistad con el Pueblo Saharaui (AEAPS) - Asociación de Familiares de Presos y Desaparecidos Saharauis (AFAPREDESA) - Asociación Navarra de Amigos y Amigas de la R.A.S.D. (ANARASD) - Asociación Navarra de Amigos y Amigas del Sahara (ANAS) - Asociación Pro Derechos Humanos de España (APDHE) - Asociación Profesional de Abogados Saharauis en España (APRASE) - Asociación Riojana de Amigos de la R.A.S.D. - Asociación Saharaui de Control de los Recursos naturales y la Protección del Medio Ambiente (Aaiún) - Asociación Saharaui para la Protección de la Cultura (Aaiún) - Asociación Saharaui contra la Tortura (Sahara occidental) - Asociación Um Draiga de Zaragoza - Asociacion Venezolana de Solidaridad con el Sáhara (ASOVESSA) - Asociación de Víctimas de Minas (ASAVIM) - Associació d'Amics del Poble Sahrauí de les Illes Balears - Association des Amis de la RASD (France) - Cantabria por el Sahara - Centro de Documentación en Derechos Humanos "Segundo Montes Mozo S.J. (CSMM) - Colectivo Saharaui de Defensores de Derechos Humanos (CODESA), (Aaiún) - Comisión Ecuménica de Derechos Humanos de Ecuador (CEDHU) - Comisión General Justicia y Paz - Comisión Nacional de los Derechos Humanos de la República Dominicana (CNDH-RD) - Comisión Nacional Saharaui por los Derechos Humanos (CONASADH) - Comité de Defensa del Derecho de Autodeterminación (CODAPSO) - Comité de Defensa de Derechos Humanos de Goulimi - Comité de Familiares de los 15 Jóvenes Secuestrados (Aaiún) - Comité de Familiares de Mártires y Desaparecidos (Aaiún) - Comité de Familiares de los Presos Políticos Saharauis (Aaiún) - Comité de Protección de los Defensores Saharauis - Freedom Sun (Smara) - Comité de Protección de los Recursos Naturales (Aaiún) - Comité Saharaui de defensa de Derechos Humanos (Smara) - Comité de Solidaridad Oscar Romero Comité Suisse de soutien au Peuple Sahraoui - Coordinadora Saharaui de Derechos Humanos de Tantan - Coordinadora de Gdeim Izik (Aaiún) - Coordinadora d'Organitzacións No-Governamentals de Cooperació al Desenvolupament (CONGDIB) - Coordinadora Estatal de Asociaciones Solidarias con el Sahara (CEAS – Sahara) - Coordinadora de las ONGs en Aaiún - Federació ACAPS de Catalunya - Federació d'Associacions de Solidaritat amb el Poble Sahraui del País Valencià - Federación Andaluza de Asociaciones Solidarias con el Sahara (FANDAS) - Federación de Asociaciones de Amigos del Pueblo Saharaui de Extremadura (FEDESAEX) - Federación de Asociaciones de Defensa y Promoción de los Derechos Humanos de España - Federación de la Comunidad de Madrid de Asociaciones Solidarias con el Sahara (FEMAS Sahara) - Federación Estatal de Instituciones Solidarias con el Pueblo Saharaui (FEDISSAH) - Forum Futuro de la Mujer Saharaui (Aaiún) - Groupe Non Violence Active (NOVA SAHARA OCCIDENTAL) - Grupo contra la Nacionalidad Marroquí (Sahara occidental) - Liga de Defensa de los Presos Políticos Saharaui (Aaiún) - Liga Saharaui de Defensa de Derechos Humanos y Protección de RW-Bojador - Observatorio Asturiano de Derechos Humanos para el Sáhara Occidental (OAPSO) - Observatorio Aragonés para el Sahara Occidental - Observatorio Saharaui de Protección del Niño (Aaiún) - Observatorio Saharaui de Recursos Naturales Pallasos en Rebeldía y Festiclown - Sindacato Español Comisiones Obrearas (CCOO) - Solidariedade Galega co Pobo Saharaui (SOGAPS) - Unión de Asociaciones Solidarias con el Sahara de Castilla y León - Unión Nacional de Mujeres Saharauis (UNMS) - Unión Nacional de la Juventud de Saguia El Hamra y Rio de Oro (UJSARIO) - Unión Nacional de Estudiantes de Saguia El Hamra y Rio de Oro (UESARIO) - Unión de Juristas Saharauis (UJS) - Unión de Periodistas y Escritores Saharauis (UPES) - Unión Nacional de Abogados Saharauis Western Sahara Resource Watch España (WSRW España) NGOs without consultative status, also share the views expressed in this statement.